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Defense Counsel Rendered Ineffective Assistance at the Sentencing Phase of a Capital Trial by Failing to Find Mitigating Evidence Contained in the Defendant's Prior Conviction Record: *Rompilla v. Beard*

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Defense Counsel Rendered Ineffective Assistance at the Sentencing Phase of a Capital Trial by Failing to Find Mitigating Evidence Contained in the Defendant's Prior Conviction Record: *Rompilla v. Beard*

CONSTITUTIONAL LAW – WRIT OF HABEAS CORPUS – INEFFECTIVE ASSISTANCE OF COUNSEL – The Supreme Court found that the assistance rendered during the sentencing phase of the defendant's capital trial fell below the standard of reasonable competence required by the Sixth Amendment when defense counsel failed to find mitigating evidence contained in the defendant's prior conviction record.

Rompilla v. Beard, 125 S. Ct. 2456 (2005).

Petitioner, Ronald Rompilla (hereinafter "Rompilla"), was convicted of first degree murder in the Court of Common Pleas, Lehigh County, Pennsylvania, for the brutal killing of James Scanlon.[1] During the sentencing phase of the trial, the prosecution sought the death penalty.[2]

The Commonwealth offered evidence of three aggravating factors to support a death sentence: (1) that the killing was perpetrated by torture; (2) that the murder was committed in the course of another felony; and (3) that Rompilla had a record of significant prior felony convictions involving the use or threat of violence.[3] The testimony of Rompilla's family members, who appealed to residual doubt and pled for mercy, was the only mitigating evidence presented by Rompilla's counsel.[4] Assigning greater weight to the

1. Commonwealth v. Rompilla, 653 A.2d 626 (Pa. 1995).

2. Rompilla v. Beard, 125 S. Ct. 2456, 2460 (2005).

3. *Rompilla*, 125 S. Ct. at 2460. Rompilla had repeatedly stabbed Scanlon and set his body on fire. *Id.* Rompilla murdered Scanlon in the victim's bar, the Cozy Corner Café, located in Allentown, Pennsylvania. *Id.* He stole Scanlon's wallet and took between five hundred and a thousand dollars from the bar. *Id.* Accordingly, Rompilla was convicted of burglary, criminal trespass, robbery, theft and receiving stolen property, as well as first degree murder. *Rompilla*, 653 A.2d at 629.

4. *Rompilla*, 125 S. Ct. at 2460.

aggravating factors established by the prosecution, the jury sentenced Rompilla to death.[5]

After his conviction and death sentence were affirmed on appeal,[6] Rompilla retained new counsel and petitioned the Commonwealth for relief under the Pennsylvania Post Conviction Relief Act,[7] asserting a claim of ineffective assistance by his trial counsel in the sentencing phase.[8] Rompilla's trial counsel knew that, in order to prove Rompilla's criminal past and to emphasize his violent character, the Commonwealth planned to introduce his prior conviction for rape and assault and would specifically read from the rape victim's earlier trial testimony.[9] Nevertheless, Rompilla's counsel failed to examine the court file on this prior conviction.[10] In this file were a number of possible mitigating factors, including evidence that Rompilla had been reared in slums and abused as a child, had an IQ in the mentally retarded range, was an alcoholic, and suffered from organic brain damage and symptoms of schizophrenia.[11] The postconviction court, applying the test pronounced in *Strickland v. Washington*,[12] nonetheless determined that trial counsel had conducted a sufficient investigation in building the mitigation case.[13] Relief was denied, and the Supreme Court of Pennsylvania affirmed the denial, upholding the postconviction court's application of *Strickland*.[14]

Rompilla next petitioned the District Court for the Eastern District of Pennsylvania under 28 U.S.C. § 2254,[15] for a writ of habeas corpus, again raising inadequate representation claims.[16] The district court decided that the Supreme Court of Pennsylvania was

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5. *Id.* at 2461.
6. *Rompilla*, 653 A.2d 626.
7. 42 PA. CONS. STAT. § 9541 (2004).
8. *Rompilla*, 125 S. Ct. at 2461.
9. *Id.* at 2464.
10. *Id.*
11. *Id.* at 2468-69.
12. 466 U.S. 668 (1984).
13. *Rompilla*, 125 S. Ct. at 2461.
14. Commonwealth v. Rompilla, 721 A.2d 786 (Pa. 1998).
15. Judiciary and Judicial Procedure Act, 28 U.S.C. § 2254 (1996). This statute provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).
16. *Rompilla*, 125 S. Ct. at 2461.

unreasonable in its application of *Strickland v. Washington*[17] and granted relief on the basis of ineffective assistance of counsel.[18] Finding that there were obvious signs of Rompilla's troubled childhood, mental illness, and alcoholism that defense counsel had failed to explore, the district court concluded that counsel was unjustified in relying on Rompilla's own account of an unremarkable background.[19]

A divided panel of the Third Circuit Court of Appeals reversed.[20] The court noted that trial counsel had made efforts to discover mitigating evidence by interviewing Rompilla and his family, and by consulting three mental health experts.[21] As these efforts gave counsel no reason to believe further investigation would reveal anything helpful, the court held that the attorneys were justified in failing to go through additional records.[22] The Court of Appeals for the Third Circuit concluded that there was nothing unreasonable about the state supreme court's application of *Strickland* and reversed the district court's grant of relief.[23] The Supreme Court of the United States granted certiorari to address the standard of reasonable competence required of Rompilla's defense counsel by the Sixth Amendment of the United States Constitution.[24]

Justice Souter delivered the majority opinion of the Supreme Court.[25] He stated that in order to receive federal habeas relief Rompilla must show that the Pennsylvania Supreme Court's adjudication of his ineffective assistance of counsel claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[26] A state court is unreasonable in its application of federal law when it "identifies the correct

17. 466 U.S. 668 (1984).
18. Rompilla v. Horn, No. CIV.A.99-737, 2000 WL 964750 (E.D. Pa. 2000).
19. *Rompilla*, 125 S. Ct. at 2461.
20. Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004).
21. *Rompilla*, 125 S. Ct. at 2461.
22. *Id.*
23. *Horn*, 355 F.3d at 233.
24. *Rompilla*, 125 S. Ct. at 2460. The Sixth Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.
25. *Rompilla*, 125 S. Ct. at 2460 (Justices Stevens, O'Connor, Ginsburg, and Breyer, joined in the majority opinion written by Justice Souter; Justice O'Connor filed a concurring opinion; and Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined.).
26. *Id.* at 2462 (citing 28 U.S.C. § 2254(d)(1)).

governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of [the] case."[27]

In *Strickland v. Washington*, the Supreme Court held that an ineffective assistance claim is comprised of two elements: (1) deficient performance by counsel (2) which results in prejudice.[28] Performance must be measured against an "objective standard of reasonableness under prevailing professional norms."[29] In *Rompilla*, the Court explained that the sufficiency of the investigation undertaken by Rompilla's counsel must be evaluated according to norms of "preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation."[30] The advantages of hindsight must be discounted, and deference must be given to counsel's judgments.[31]

The Court recognized that Rompilla's counsel did not entirely disregard their duty to find mitigating evidence, as they did interview Rompilla and members of his family and review the reports given by the mental health experts who had testified at trial.[32] These sources produced no helpful information.[33] However, the Court also noted a number of promising avenues unexplored by the defense lawyers, including school records, records of Rompilla's juvenile and adult incarcerations, and a closer look at Rompilla's history of alcohol dependence.[34] In response, the Commonwealth argued that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; [and] reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."[35] The Court conceded that whether counsel was obligated

27. *Rompilla*, 125 S. Ct. at 2462 (quoting Wiggins v. Smith, 539 U.S. 510, 520 (2003)).
28. *Rompilla*, 125 S. Ct. at 2462.
29. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).
30. *Rompilla*, 125 S. Ct. at 2462.
31. *Id. See also Strickland*, 466 U.S. at 689-91.
32. *Rompilla*, 125 S. Ct. at 2462.
33. *Id.* Rompilla himself was uninterested in helping and even sent counsel off on false leads. *Id.* When asked about his childhood and schooling, he answered that except for the fact that he had quit school in ninth grade, they had been normal. *Id.* Family members admitted that they did not know Rompilla very well because he had spent most of his adult life and some of his childhood in custody. *Id.* at 2463. The three mental health witnesses had been retained during the guilt phase to evaluate Rompilla's mental state at the time of the crime and to assess his competency to stand trial, but counsel found nothing useful as mitigation in their reports. *Rompilla*, 125 S. Ct. at 2462.
34. *Id.* at 2463.
35. *Id.*

to pursue any of these other sources was arguable.[36] However, the Court found that, in failing to examine the court file on Rompilla's prior rape and assault conviction, defense counsel was clearly deficient.[37]

Defense counsel knew that the Commonwealth planned to support its request for a death sentence by introducing Rompilla's rape and assault conviction and reading his prior victim's testimony of his violent character.[38] Yet, Rompilla's attorneys did not obtain the file until the day before the sentencing hearing, when the prosecutor warned counsel for a second time of his intention to use the prior conviction case and victim transcript.[39] The Court stated that the defense had "a duty to make all reasonable efforts to learn what they could" about the prosecution's case for aggravation, and "reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction," which was to constitute the centerpiece of the prosecution's case.[40] In further support of this contention, the Court referred to the American Bar Association Standards for Criminal Justice,[41] which have long been a guide for the Court in determining what is reasonable.[42]

The Commonwealth argued that the efforts defense counsel made to find mitigating evidence from other sources excused them from looking at the file of this prior conviction.[43] The Court, however, held that "it flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking."[44] As such, the Court concluded

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36. *Id.*
37. *Rompilla*, 125 S. Ct. at 2463.
38. *Id.* at 2464.
39. *Id.*
40. *Id.* at 2465.
41. *Id.* at 2465-66. The ABA Standards for Criminal Justice in effect at the time Rompilla was on trial provided, in relevant part:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to . . . the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution* and . . . [t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt . . . .

ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. & 1982 Supp.) (emphasis added).
42. *Rompilla*, 125 S. Ct. at 2466.
43. *Id.* at 2466-67.
44. *Id.* at 2467.

that the performance of defense counsel was deficient and that the state court had come to an objectively unreasonable conclusion.[45]

Having determined that the performance of Rompilla's counsel was deficient, the Court turned to the second prong of the *Strickland* test, considering whether this deficient performance resulted in prejudice.[46] Prejudice has resulted when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[47] The majority concluded that the deficient performance of Rompilla's counsel was clearly prejudicial as the neglected prior conviction file contained a number of untapped mitigation leads.[48]

The file contained an evaluation by a corrections counselor, which revealed that Rompilla was reared in the slums, had quit school at age sixteen, and had been in and out of jail from an early age.[49] Also in the same file were test results showing that Rompilla had a third grade level of cognition and symptoms of schizophrenia and other disorders.[50] The Court argued that these findings would have prompted further investigation and likely would have revealed much of the information discovered by postconviction counsel.[51] The Court concluded that all this evidence "add[ed]

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45. *Id.*

46. *Id.* at 2467.

47. *Rompilla*, 125 S. Ct. at 2467 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

48. *Rompilla*, 125 S. Ct. at 2467-68.

49. *Id.*

50. *Id.*

51. *Id.* at 2468-69. From testimony of family members, whom Rompilla's trial counsel had not interviewed, postconviction counsel found that:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id. (quoting Rompilla v. Horn, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J., dissenting)). Tests conducted by postconviction counsel also showed that Rompilla "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions," and that "Rompilla's problems relate back to childhood, and were likely

up to a mitigation case that [bore] no relation to the few naked pleas for mercy actually put before the jury . . . [and] the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability."[52] The Supreme Court, therefore, reversed the judgment of the Third Circuit, and ordered that Pennsylvania either retry the case on penalty or stipulate to a life sentence.[53]

Justice O'Connor, who joined in the majority opinion, wrote a separate concurrence to address the claim of the dissent that this decision imposed a rigid requirement on defense attorneys to inspect the case file of any prior conviction the prosecution might use at trial.[54] Justice O'Connor contended, however, that no mechanical rule was promulgated by the Court's decision; rather, the decision was a product of the Court's "longstanding case-by-case approach" to evaluating the constitutional sufficiency of an attorney's performance.[55] It was upon consideration of all the circumstances[56] that the Court determined that the failure to examine the prior conviction file was unreasonable in *this* case.[57]

Justice Kennedy, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, dissented.[58] They insisted that the majority opinion imposed a per se rule and ignored the deference owed to counsel's decisions, as well as the Court's own past warnings "against the creation of 'specific guidelines' or 'checklist[s] for judicial evaluation of attorney performance.'"[59]

The dissent argued that the Pennsylvania Supreme Court was not objectively unreasonable in finding Rompilla's representation to be adequate.[60] Rompilla's counsel, Justice Kennedy said, knew enough about his prior conviction to decide that reviewing the case

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caused by fetal alcohol syndrome . . . ." *Rompilla*, 125 S. Ct. at 2469 (quoting *Rompilla*, 355 F.3d at 280 (Sloviter, J., dissenting)).

52. *Rompilla*, 125 S. Ct. at 2469.

53. *Id.*

54. *Id.* at 2469 (O'Connor, J., concurring).

55. *Id.*

56. *Id.* at 2470. Justice O'Connor listed three specific circumstances making counsel's failure unreasonable: (1) defense counsel was on notice that the prior conviction would constitute the heart of the prosecution's argument; (2) the prior conviction was of a similar crime and threatened the defense's appeal to residual doubt; and (3) failure to examine the file was not a tactical decision made because the file was inaccessible or inordinately large, or in order to spend time following other leads. *Id.* at 2470-71.

57. *Rompilla*, 125 S. Ct. at 2470-71 (O'Connor, J., concurring).

58. *Id.* at 2471 (Kennedy, J., dissenting).

59. *Id.* at 2471-73 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

60. *Rompilla*, 125 S. Ct. at 2471 (Kennedy, J., dissenting).

file would be a waste of their time.[61] The majority argued that the entire file could be reviewed with ease, but the dissent contended that the record lent no support to this assumption.[62] Justice Kennedy argued that if counsel had hoped to discover details about Rompilla's mental condition and upbringing, they were more likely to get this type of information from the very sources they tapped — Rompilla himself, his family, and the three mental health experts.[63]

Justice Kennedy went on to argue that, even assuming that counsel was deficient in failing to review the conviction file, Rompilla was still not entitled to habeas relief because "[t]he Court's theory of prejudice rests on serendipity."[64] The majority held that without the mitigating evidence discovered by postconviction counsel, Rompilla's sentence was prejudiced.[65] Justice Kennedy explained, however, that postconviction counsel found leads to this mitigating evidence only in an "Initial Transfer Petition" that had been prepared by the Pennsylvania Department of Corrections and happened to be included in the conviction file.[66] The dissent argued that Rompilla could not establish prejudice because even if counsel had reviewed the case file, as the majority believed they should have, "there would have been no reason for counsel to read, or even to skim, this obscure document."[67] Justice Kennedy concluded the dissent by asserting that the Court's analysis was clouded by hindsight and, as a result, the majority imposed a rigid requirement on defense attorneys that is supported by neither case law nor common sense.[68]

A criminal defendant's right to the assistance of counsel has been an essential principle of criminal justice in the United States since colonial times.[69] The Sixth Amendment guarantee that the

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61. *Id.* at 2474. Defense counsel knew that Rompilla had been convicted of breaking into the apartment of bar owner Josephine Macrenna. *Id.* After taking the bar's receipts, he demanded that she undress. *Id.* Ms. Macrenna initially resisted, and Rompilla slashed her breast with a knife and proceeded to rape her at knifepoint for over an hour. *Id.* "[Q]uibbling with the Commonwealth's version of events was a dubious trial strategy," and, instead, "[trial counsel] fought vigorously to prevent the Commonwealth from introducing the details." *Rompilla*, 125 S. Ct. at 2474 (Kennedy, J., dissenting).

62. *Id.* at 2475.

63. *Id.* at 2474.

64. *Id.* at 2476.

65. *Rompilla*, 125 S. Ct. at 2467-69.

66. *Id.* at 2476-77 (Kennedy, J., dissenting).

67. *Id.*

68. *Id.* at 2478.

69. Powell v. Alabama, 287 U.S. 45, 61-65 (1932).

criminally accused "shall enjoy the right . . . to have the Assistance of Counsel for his defense"[70] is a safeguard "necessary to insure fundamental human rights of life and liberty."[71] In 1932, the Supreme Court decided that three criminal defendants were denied this constitutional right in *Powell v. Alabama*.[72]

The defendants in *Powell*, three young, ignorant, illiterate, black boys, were charged with the rape of two white girls, convicted, and sentenced to death.[73] As residents of other states with no family or friends in Alabama, the defendants were not asked whether they had or could hire counsel, whether they wanted to have counsel appointed, or whether they wished to communicate with friends or family for assistance.[74]

The trial judge had appointed "all the members of the bar" for the "purpose of arraigning the defendants," and anticipated or hoped that one of them would continue to represent the boys at trial if no one else appeared on their behalf.[75] At the commencement of trial, however, there was no one to answer for the defendants, and no particular lawyer had been named to represent them.[76] A Tennessee lawyer named Roddy addressed the trial court, explaining that he had been sent from Chattanooga by parties interested in the defendants, but that "'the boys would be better off if [he stepped] entirely out the of case'" because he was in no way prepared to defend them and was unfamiliar with Alabama procedure.[77] A member of the Alabama bar named Moody then offered to "'go go ahead and help Mr. Roddy in anything [he could] do about it,'" and the trial judge, thus satisfied, proceeded with the trial.[78]

The Supreme Court stated that the defendants were presumed innocent until convicted, and "it was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial," including the assistance of counsel.[79] The trial judge's appointment of "the members of the bar" was merely

70. U.S. CONST. amend. VI.
71. Johnson v. Zerbst, 304 U.S. 458, 462 (1938). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963).
72. *Powell*, 287 U.S. at 71.
73. *Id.* at 49-52.
74. *Id.* at 52.
75. *Id.* at 56.
76. *Id.* at 53.
77. *Powell*, 297 U.S. at 55.
78. *Id.* at 56.
79. *Id.* at 52.

"an expansive gesture, imposing no substantial or definite obligation upon any one."[80] Mr. Roddy, charged with responsibility on the morning of trial, was given no opportunity to investigate or prepare a defense.[81] The Supreme Court reasoned that, under these circumstances, the appearance of counsel was "rather pro forma than zealous and active," and ruled that "defendants were not accorded the right of counsel in any substantial sense."[82]

In subsequent decisions, the Court dealt with other situations in which there was actual or constructive denial of assistance altogether.[83] In 1984, *Strickland v. Washington*[84] presented the first opportunity for the Court to directly address a claim that counsel's assistance, though actually rendered, was unconstitutionally ineffective.[85] To evaluate such a claim, the Court first had to define the standard of reasonable competence required of defense counsel by the Sixth Amendment.[86] At the time *Strickland* reached the Supreme Court, all of the circuit courts of appeal, with one exception, had adopted some sort of "reasonable competence" standard of effectiveness.[87] However, the way in which the standard was applied varied dramatically.[88] At the time of *Strickland*'s writ of certiorari, the Attorneys General of forty-two states urged as amici curiae that "there [was] a vital and immediate need for [the Supreme] Court to resolve the conflicts that presently [existed] among the states and the federal circuits and establish guidelines by which courts [could] begin to analyze these claims with a measure of consistency."[89]

In *Strickland*, the defendant, Washington, had planned and committed a number of violent crimes, including three capital murders.[90] He pled guilty to all charges.[91] The trial judge stated that he had "a great deal of respect for people who are willing to

80. *Id.* at 56.
81. *Id.* at 58.
82. *Powell*, 297 U.S. at 58.
83. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980) (an actual conflict of interest may so adversely affect counsel's performance as to constructively deny assistance); Herring v. New York, 422 U.S. 853 (1975) (state statute constructively denied assistance of counsel by authorizing trial judge to prevent counsel from making a closing argument).
84. 466 U.S. 668 (1984).
85. *Strickland*, 466 U.S. at 683.
86. *Id.* at 671.
87. Brief for the State of Alabama et al. as Amici Curia Supporting Petition for Writ of Certiorari at 3, Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554).
88. Brief for the State of Alabama et al., *supra* note 87, at 3.
89. *Id.* at 2.
90. *Strickland*, 466 U.S. at 671-72.
91. *Id.* at 672.

step forward and admit their responsibility," but also added that this was to say nothing about the sentencing decision he would make.[92] In his plea colloquy, Washington told the judge that "he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress."[93] Washington then, against the advice of his counsel, opted to be sentenced by the trial judge without jury recommendation.[94] The judge found as aggravating factors that all three murders were "especially heinous, atrocious, and cruel . . . were committed in the course of at least one other dangerous and violent felony . . . were for pecuniary gain . . . [and] were committed to avoid arrest."[95] Regarding mitigating factors, the judge found that Washington was not suffering from extreme mental or emotional disturbance during the commission of the crimes and that "even if respondent had no significant history of criminal activity, the aggravating circumstances 'would still clearly far outweigh' that mitigating factor."[96] Thus, the trial judge sentenced Washington to death.[97]

After being denied collateral relief at the state level, Washington petitioned federal court for a writ of habeas corpus.[98] His request for relief included a claim that his trial counsel was ineffective at the sentencing phase.[99] The District Court for the Southern District of Florida denied relief, concluding that although counsel's failure to further investigate certain mitigating evidence reflected an error in judgment, no prejudice to Washington's sentence resulted.[100] Using its own method to analyze the claim, the Court of Appeals for the Fifth Circuit reversed the decision of the district court.[101]

On appeal, the Supreme Court began by recognizing that the purpose of the right to assistance of counsel is to ensure the accused a fair trial.[102] With this purpose in mind, the Court stated that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function-

92. *Id.*
93. *Id.*
94. *Id.*
95. *Strickland*, 466 U.S. at 674. The murders involved repeated stabbings and were committed in the course of robberies. *Id.*
96. *Id.*
97. *Id.* at 675.
98. *Id.* at 678.
99. *Id.* at 675.
100. *Strickland*, 466 U.S. at 678-79.
101. *Id.* at 679.
102. *Id.* at 686.

ing of the adversarial process that the trial cannot be relied on as having produced a just result."[103] The Court concluded that a successful claim for relief based on ineffective assistance of counsel must contain two required elements.[104] "First, the defendant must show that counsel's performance was deficient, . . . [and] [s]econd, the defendant must show that the deficient performance prejudiced the defense."[105]

Regarding the first element, the *Strickland* Court explained that performance is deficient when it falls below an "objective standard of reasonableness" as determined by "prevailing professional norms."[106] The Court emphasized that "more specific guidelines are not appropriate."[107] Noting the language of the Sixth Amendment, which refers simply to "counsel" without specifying precise requirements, the Court explained that "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[108]

The Court stated that a defendant making a claim of ineffective assistance must specifically point to those acts or omissions that he claims were not products of "reasonable professional judgment."[109] The Court directed that counsel's challenged conduct must be judged on the facts of the particular case as they existed at the time of the acts or omissions.[110] Thus freed from the "distorting effects of hindsight," a court must then determine whether counsel's conduct was within the "wide range of professionally competent assistance."[111]

Regarding counsel's choices, the Court stated that "strategic choices made after thorough investigation of law and facts rele-

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103. *Id.* The Court reasoned that "a capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial." *Id.* at 686-87. *See also* Barclay v. Florida, 463 U.S. 939 (1983); Bullington v. Missouri, 451 U.S. 430 (1981).

104. *Strickland*, 466 U.S. at 687.

105. *Id.*

106. *Id.* at 687-88.

107. *Id.* at 688.

108. *Id.* at 688-89.

109. *Strickland*, 466 U.S. at 690. *See also* Michel v. Louisiana, 350 U.S. 91 (1955) (There is a presumption of effective assistance, and defendant bears the burden of proving inadequacy).

110. *Strickland*, 466 U.S. at 689-90.

111. *Id.* at 690.

vant to plausible options are virtually unchallengeable."[112] Further, the Court explained that the reasonableness of counsel's actions will often be influenced by the statements or actions of his client.[113] "When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful," the Court said, "counsel's failure to pursue those investigations may not later be challenged as unreasonable."[114]

Moving on to the prejudice element of the claim, the *Strickland* Court first recognized that there are certain contexts in which prejudice is presumed to result from a Sixth Amendment violation.[115] Such circumstances have included cases where assistance of counsel was denied entirely, where the government interfered with counsel's assistance, and where counsel represented conflicting interests.[116] However, the Court decided that when asserting a claim that counsel's assistance was not denied altogether, but rather was deficient or ineffective, a defendant must affirmatively prove prejudice.[117] The Court said it is insufficient to show that counsel's shortcomings had some conceivable impact on the outcome.[118] Rather, the Court required that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[119]

The Court then applied its newly stated principles to the facts of Washington's case.[120] In preparation for sentencing, Washington's counsel spoke with the defendant, his wife, and his mother about Washington's background, but he did not search for other character witnesses or seek a psychiatric examination, and he did not request that a pre-sentence report be made.[121] Counsel argued at the sentencing hearing that Washington should be spared because he was under extreme mental or emotional disturbance at the time of the crimes and had taken responsibility, confessed, and shown remorse.[122] The prosecution presented evidence mainly to

112. *Id.*
113. *Id.* at 691.
114. *Id.*
115. *Strickland*, 466 U.S. at 692.
116. *See* Cuyler v. Sullivan, 466 U.S. 335 (1980); Herring v. New York, 422 U.S. 853 (1975); Powell v. Alabama, 287 U.S. 45 (1932).
117. *Strickland*, 466 U.S. at 693.
118. *Id.* at 694.
119. *Id.*
120. *Id.* at 698.
121. *Id.* at 672-73.
122. *Strickland*, 466 U.S. at 673-74.

describe the details of the crimes and the manner of death of Washington's victims, and defense counsel did not cross-examine the government's medical experts.[123]

Washington claimed that counsel was inadequate in numerous respects.[124] However, the Supreme Court denied relief, finding that counsel's strategy was the result of professionally reasonable judgment.[125] The Court said counsel could reasonably conclude from his conversations with Washington that further character and psychological evidence would not be helpful.[126] Also, the Court noted that by restricting character testimony to what had been entered at the plea colloquy, counsel foreclosed the prosecution from entering contrary character and psychological evidence, and kept out Washington's prior record, which counsel had successfully moved to exclude.[127]

Further, the Court concluded that Washington could not show that any acts or omissions on the part of counsel resulted in unfair prejudice.[128] In support of his claim, Washington presented affidavits from acquaintances who would have been willing to testify on his behalf and a psychiatric report and psychological report stating that Washington, "though not under the influence of extreme mental or emotional disturbance, was 'chronically frustrated and depressed because of his economic dilemma' at the time of his crimes."[129] Considering that the trial judge had found overwhelming aggravating factors, the Court concluded "there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed."[130] Thus, the Supreme Court denied Washington's request for habeas relief.[131]

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123. *Id.* at 674.

124. *Id.* at 675. Washington claimed that his trial counsel was deficient because "he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts." *Id.*

125. *Id.* at 699-700.

126. *Id.* at 699.

127. *Strickland*, 466 U.S. at 699.

128. *Id.* at 699-700.

129. *Id.* at 675-76.

130. *Id.* at 700.

131. *Id.* at 701.

The Court was faced with another claim of ineffective assistance of counsel during sentencing in *Williams v. Taylor*.[132] After the Virginia Supreme Court rejected his claim, Williams petitioned for federal habeas corpus relief under 28 U.S.C. § 2254.[133] Before turning to the merits of the claim, the United States Supreme Court first had to address how its authority to grant federal habeas relief had been affected by the Antiterrorism and Effective Death Penalty Act of 1966 (AEDPA), which amended the Judiciary and Judicial Procedure Act.[134] The Court asserted that, as amended, the statute dictated that state court decisions may be challenged only against "clearly established Federal law, as determined by the Supreme Court," and relief may only be granted where the decision of the state tribunal was "contrary to, or involved an unreasonable application of" that law.[135]

The Court explained that "clearly established Federal law, as determined by the Supreme Court" referred to the precedent established by the Supreme Court's holdings at the time of the state court decision at issue.[136] Further, the Court emphasized that for the purposes of this statute, a rule of law may be adequately clear even when expressed as a generalized standard, as opposed to a bright-line rule.[137] The Court found that Williams' claim met this AEDPA threshold question as its merits were squarely governed by the Court's holding in *Strickland*.[138] Thus, Williams would be entitled to relief if the Virginia Supreme Court's rejection of his claim was contrary to or resulted from an unreasonable application of the *Strickland* standard.[139]

Williams, while incarcerated for another offense, wrote a letter to the police confessing responsibility for a killing that had oc-

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132. 529 U.S. 362 (2000).

133. *Williams*, 529 U.S. at 372.

134. *Id.* at 375-90. The relevant part of the Judiciary and Judicial Procedure Act, as amended, is contained in § 2254(d)(1), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

135. *Williams*, 529 U.S. at 379.

136. *Id.* at 381.

137. *Id.* at 382.

138. *Id.* at 390.

139. *Id.* at 379.

curred six months earlier.[140] Within a few months, Williams was convicted of robbery and capital murder.[141] At sentencing, Williams' counsel emphasized the fact that he had turned himself in and initiated the contact with the police, but admitted that it was "'very difficult to ask [the jury] to show mercy to a man who maybe had not shown much mercy himself.'"[142] The jury, finding a "probability of future dangerousness," recommended a death sentence.[143]

In support of his claim that counsel was ineffective at sentencing, Williams argued that his juvenile and social services records, undiscovered by counsel, revealed a plethora of mitigating evidence that the jury never heard.[144] Trial counsel admitted that his failure to seek Williams' juvenile and social services records was not based on a strategic decision that such records would not be helpful, but rather was based on his erroneous belief that state law did not permit it.[145] The Court thus found that trial counsel was deficient in failing to conduct a thorough investigation of the defendant's background.[146]

The Court criticized the Virginia Supreme Court's evaluation of the prejudice element, asserting that the state court failed to consider the totality of the mitigation evidence available and reweigh it against the evidence in aggravation.[147] The Court concluded that, had trial counsel's argument been augmented by the compelling evidence of the abuse and neglect suffered by Williams throughout his childhood, it "might well have influenced the jury's appraisal of his moral culpability."[148] Thus, the Court concluded that "the Virginia Supreme Court rendered a 'decision that was contrary to, or involved an unreasonable application of, clearly

140. *Williams*, 529 U.S. at 367. Stone was found dead at his home, and the police, finding no evidence of a struggle, concluded that the cause of death was blood alcohol poisoning, and considered the case closed. *Id.*

141. *Id.* at 368.

142. *Id.* at 369 n.2.

143. *Id.* at 370.

144. *Id.* at 370-71. Documents related to Williams' commitment at age eleven described an early childhood rife with abuse and neglect, and contained evidence that he was borderline mentally retarded, had suffered numerous head injuries, and suffered from organic brain impairments. *Id.* The habeas hearing also revealed that the State's own experts believed that Williams would not be dangerous if kept in a "structured environment." *Id.*

145. *Williams*, 529 U.S. at 373.

146. *Id.* at 396.

147. *Id.* at 397-98.

148. *Id.* at 398.

established Federal law' . . . and Williams' constitutional right to effective assistance of counsel . . . was violated."[149]

In 2003, the Court decided *Wiggins v. Smith*,[150] applying the *Strickland* standard to yet another set of facts and further expounding the meaning of the 1996 amendments to § 2254.[151] Clarifying its discussion of the AEDPA in *Williams*, the Court stated that habeas relief may be granted under § 2254(d)(1) if the state court has used the correct legal principle, but has unreasonably applied that principle to the facts of the case.[152] Further, the Court said, "in order for a federal court to find a state court's application of our precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous . . . [it] must have been 'objectively unreasonable.'"[153]

Wiggins complained that counsel was ineffective in failing to investigate and offer evidence at sentencing of his severely dysfunctional background.[154] Defense counsel knew from Wiggins' written presentence investigation (PSI), which included a one-page personal history of the defendant, that Wiggins described his own background as "disgusting" and had spent most of his life in foster care.[155] Counsel acquired records of his placements in the foster care system from the Baltimore City Department of Social Services (DSS).[156] However, the PSI and DSS records were apparently the only two sources of background information used by counsel.[157]

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149. *Id.* at 399.

150. 539 U.S. 510 (2003).

151. *Wiggins*, 539 U.S. at 520-21.

152. *Id.* at 520.

153. *Id.* at 520-21 (citing *Williams*, 529 U.S. at 409).

154. *Wiggins*, 539 U.S. at 516. In support of his claim, Wiggins presented a report by a licensed social worker, who had used state social services, school and medical records, along with interviews with Wiggins and many family members, to outline his miserable life history. *Id.* at 516-17. Quoting the report, the Court said:

> Petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner . . . At the age of six, the State placed Wiggins in foster care . . . [where his] first and second foster mothers abused him physically, and . . . the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets.

Id.

155. *Id.* at 523.

156. *Id.*

157. *Id.* at 523-24.

In *Wiggins*, the Court found that counsel's failure to expand their search despite the significant leads discovered in the PSI and DSS records was deficient under the professional standards that prevailed in the jurisdiction at the time.[158] Considering the nature and the extent of the abuse suffered by Wiggins, the Court concluded that "had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence."[159]

These attempts of the Court to elucidate and apply a standard for adjudicating ineffective assistance of counsel claims raise various issues and implicate competing concerns. Perhaps most flagrant are the difficulties associated with applying the vague, general rule outlined in *Strickland*. This problem is evident from the number of cases in which the district court's decision was reversed by the circuit court, which was in turn reversed by the Supreme Court.[160] The *Srickland* test declares that counsel has rendered ineffective assistance when counsel's performance is deficient and when that deficiency results in prejudice.[161] However, this seemingly straightforward, two-prong test has meaning only to the extent that "deficient" and "prejudice" are given meaning. Explaining that sufficiency of performance should be measured against an "objective standard of reasonableness" in light of prevailing professional norms[162] offers little help. Saying that prejudice turns on whether there is a "reasonable probability" that the result would have been different absent counsel's errors[163] is no more helpful. Despite its use of words like "objective" and "reasonable," as Justice Marshall said in *Strickland*, "in essence, the majority has instructed judges . . . to avert to their own intuitions . . . ."[164]

Further muddling the issue is the standard of review incorporated in the Judiciary and Judicial Procedure Act.[165] The Court has construed this statute to require that a state court's decision may be overturned only when that court has been "objectively

158. *Id.* at 524. Preparation of a social history report in capital cases was standard practice in Maryland where Wiggins went to trial. *Id.* The Public Defender's office regularly provided funds to retain a forensic social worker for such purposes. *Id.* Nevertheless, defense counsel chose not to commission a report. *Id.*

159. *Wiggins*, 539 U.S. at 534-37.

160. *See* Rompilla v. Beard, 125 S. Ct. 2456 (2005); *Wiggins*, 539 U.S. 510; Williams v. Taylor, 529 U.S. 362 (2000).

161. Strickland v. Washington, 466 U.S. 668, 687 (1984).

162. *Strickland*, 466 U.S. at 688.

163. *Id.* at 694.

164. *Id.* at 708 (Marshall, J., dissenting).

165. 28 U.S.C § 2254 (1996).

unreasonable" in its application of the *Strickland* test.[166] Thus, federal courts dealing with habeas corpus claims based on ineffective assistance of counsel are given the unintelligible task of determining whether a state court was "objectively unreasonable" in its application of a two-prong test, which, at its core, seems to ultimately appeal to intuitions.

In *Strickland*, Justice Marshall argued in his dissenting opinion that many aspects of criminal defense are "amenable to judicial oversight . . . [and] could profitably be made the subject of uniform standards."[167] The majority, however, refused to start down a path toward detailed guidelines or checklists and instead emphasized the importance of reviewing counsel's decisions with deference.[168] Justice O'Connor astutely recognized that "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."[169] Further, there are serious concerns of how intense scrutiny and mechanical requirements would affect the integrity of the criminal justice system and the legal profession.[170] If intrusive post-trial inquiry were available, ineffectiveness claims would be encouraged and the finality of criminal adjudications eroded.[171] In turn, the increased possibility of post-conviction criticism and reversal may "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."[172]

These legitimate concerns have prevented the Court from delineating more particularized or clear-cut standards. Instead, the *Strickland* analysis continues to be used on a case-by-case basis to assess the reasonableness of counsel's actions and omissions under given circumstances. Considering the various interests in tension discussed above, perhaps this is the best approach after all. The *Strickland* analysis affords courts a great deal of flexibility, allowing judges to consider the whole scenario and factor in its subtleties in a way that adherence to mechanical rules would not permit. Some degree of clarity and uniformity may be sacrificed.

166. *See* Wiggins v. Smith, 539 U.S. 510, 520-21 (2003) (citing Williams v. Taylor, 529 U.S. 362, 409 (2000)).
167. *Strickland*, 466 U.S. at 709 (Marshall, J., dissenting).
168. *Id.* at 690 (majority opinion).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Strickland*, 466 U.S. at 690.

However, where questions of fundamental fairness are at issue, intuition is sometimes the keenest sense.

April Trimble